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June 17, 2008

TO: Each Supervisor

FROM: Jonathan E. Fielding, M.D., M.P.H. *Jeffrey*
Director and Health Officer

SUBJECT: **PHYSICIAN-OWNED SURGERY CENTERS STATE LICENSING**

On May 27, 2008, your Board approved a motion by Supervisor Antonovich directing the Department of Public Health (DPH) and County Counsel to contact the California Department of Public Health (CDPH) to determine the impact of Capen v. Shewry and report back to the Board in three weeks. This decision, and CDPH's interpretation of it are significant because they have the potential to affect the ability of clinics and patients to receive reimbursement for care from third party payers such as Medi-Cal. Capen also could have implications for malpractice coverage for the physicians practicing at these clinics.

This report is a response to that motion.

THE CAPEN V. SHEWRY DECISION

Pursuant to Section 1200, et seq. of the California Health and Safety Code, certain types of clinics and surgical clinics are eligible for licensure by CDPH. The Statute defines "surgical clinics" to exclude clinics that are owned and operated by one or more physicians, but expressly provides that physicians or dentists may, at their option, apply for licensure. CDPH had interpreted the Statute as excluding from mandatory licensure only clinics in which all of the physicians are owners, and requiring licensure of physician-owned clinics in which non-owner physicians practice. CDPH had also licensed physician-owned clinics that voluntarily requested it.

However, on September 19, 2007, the Third District Court of Appeals issued its decision in the Capen vs. Shewry lawsuit holding that all clinics that are owned by a physician or group of physicians are excluded from licensure by CDPH. According to the decision, physician-owned clinics are subject to licensure by the Medical Board of California, which licenses certain "outpatient surgery settings" that use anesthesia.

CDPH has interpreted the decision as stripping it of the authority to license or regulate *any* physician-owned surgical clinic, including the authority to issue licenses that physicians request voluntarily.

Because most third party payers, such as Medi-Cal, have historically insisted that surgical clinics, including those owned by physicians, be licensed as a condition of their agreements with the third party payers, most physician-owned clinics elected to be licensed.

CDPH contracts with DPH's Health Facilities Inspection Division (HFID) to provide inspections for state licensing, as well as Medicare certification.

POTENTIAL IMPACT FOR PHYSICIAN-OWNED CLINICS AND PATIENTS

The impact of *Capen v. Shewry* for clinics and patients is uncertain, because it is not yet clear how third party payers will interpret this ruling, and CDPH's interpretation of the ruling, for billing purposes.

Concerns have been raised that the ruling in *Capen v. Shewry* may result in difficulties for clinics and patients when dealing with third party payers such as Medi-Cal and insurance companies. Insurance carriers may limit or deny coverage for procedures performed at unlicensed clinics, and the decision could also have an impact on the availability of care for Medi-Cal patients. Although the Medical Board has the legal authority to license clinics, provider agreements for Medi-Cal and other third party payers are currently based on CDPH licensure and these parties have not yet stated that they will restructure their agreements for licensure by the Medical Board. However, given that this ruling will affect many clinics in the State, third party payers may also choose to modify their requirements to accommodate this change.

Concerns have also been raised that physicians could face increased malpractice exposure if they perform procedures without a license from the State. Certainly, their risk exposure will increase significantly if their malpractice insurers do not provide coverage, which in turn could limit the availability of healthcare to patients. It is unclear whether this will actually occur.

In response to inquiries from DPH staff, CDPH staff has stated that the impact of *Capen v. Shewry* and the change in CDPH's licensing practices, is still unknown. CDPH and the California Medi-Cal Provider Enrollment Department are now trying to determine how to resolve the conflict between the *Capen* ruling and Medi-Cal licensure requirements for billing and reimbursement.

IMPACT FOR DPH

Because CDPH has stopped licensing or regulating surgical clinics that have any degree of physician ownership, HFID cannot issue or renew a license for any surgical clinic that is partly or entirely physician owned.

HFID is still required to inspect clinics that are Medicare certified. Because there is currently only one physician-owned clinic in Los Angeles County that is not Medicare certified, HFID anticipates it will still conduct approximately the same number of inspections at the Medicare certified facilities. Although inspections for Medicare certification are very similar to inspections for licensure, Medicare is a separate program from Medi-Cal and third party payers have not indicated that they will accept certification as a substitution for licensure.

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Providers or other interested parties with questions about Medi-Cal reimbursement may contact the Department of Health Care Services, Provider Enrollment Branch, at (916) 319-8115. Surgical clinics partly or entirely owned by physicians may go to the Medical Board of California's website at (www.mbc.ca.gov/outpatient_surgery.html) for additional information.

If you have any questions or need additional information, please contact me.

JEF:bjs

c: Chief Executive Officer
County Counsel
Executive Officer, Board of Supervisors